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In the Supreme Court of the United States

No. [redacted]/30

OCTOBER TERM, 1953.

SAUNDERS P. LEMON,
Petitioner,

vs.

HONORABLE JOHN H. DRUFFEL,
Judge of the United States District Court for the Southern District of Ohio, Western Division,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9247

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In the Supreme Court of the United States

No. _____

OCTOBER TERM, 1958.

SAUNDERS P. LEMON,

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vs.

HONORABLE JOHN H. DRUFFEL,
Judge of the United States District Court for the
Southern District of Ohio, Western Division,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Saunders P. Lemon, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on April 1, 1958, which denied a petition for a writ of mandamus to direct the respondent to nullify an order of transfer previously issued by respondent pursuant to 28 U. S. C. 1404(a).

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 253 F. 2d 680 (Appendix A).

No opinion was filed by the respondent, Honorable John H. Druffel, District Judge, in granting an order to transfer the action entitled *Saunders P. Lemon, Plaintiff, vs. The Chesapeake and Ohio Railway Company, Defendant*, from the Southern District of Ohio to the Eastern District of Kentucky. The order was entered on January 13, 1958, and is printed in Appendix B.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 1, 1958 (Appendix B). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether Section 1404(a) of the Judicial Code (28 U. S. C. 1404(a)) empowers a district judge to disregard the venue selection of an injured workman suing under the Federal Employers' Liability Act in the district of his residence by directing a transfer to an adjoining district in the absence of substantial grounds therefor.

2. Whether the fact that a district court permitted a plaintiff after answer filed to dismiss without prejudice over objection of defendant railway on the ground that plaintiff's purpose was to refile at a more distant point where it would be inconvenient for the railway to produce witnesses and where the jury would be unable to see the premises, estopped the railway, in a subsequent action, from asserting the same grounds in support of a motion to transfer from the second, back to the first, forum.

3. Whether, under the doctrine of the *Norwood* case, the discretion of the district judge in ruling on a motion to transfer is so broad as to preclude review.

4. Whether, under the power to issue all necessary writs (28 U. S. C. 1651(a)), a writ of mandamus should issue to correct an order of transfer made by the district judge outside the bounds of proper legal discretion.

STATUTES INVOLVED.

The suit in the district court was instituted under the provisions of the Federal Employers' Liability Act, 45 U. S. C., Section 51 *et seq.* The venue provisions of the Federal Employers' Liability Act are contained in Section 6 thereof (45 U. S. C. 56), which reads as follows:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

The order of transfer was issued by the District Court upon the claimed authority of Section 1404(a) of the Judicial Code (28 U. S. C. 1404(a)), which reads as follows:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Jurisdiction of the Court of Appeals was invoked pursuant to Section 1651(a) of the Judicial Code (28 U. S. C. 1651(a)), which reads as follows:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT.

The petitioner brought an action against The Chesapeake and Ohio Railway Company under the provisions of the Federal Employers' Liability Act to recover damages for serious injuries suffered by him on November 22, 1954, while performing his duties as a check clerk for defendant railroad at its freight office at Ashland, Kentucky. Petitioner has been a resident of Ironton, Ohio, which is across the Ohio River from Ashland, Kentucky, and less than ten miles distant.

The action was originally filed on February 17, 1956 in the United States District Court for the Eastern District of Kentucky, sitting at Catlettsburg. The defendant railway filed its answer on March 6, 1956. Subsequently, petitioner moved to dismiss the action filed at Catlettsburg without prejudice. The motion for dismissal was, as appears from the affidavit filed on behalf of the defendant railway, strenuously opposed. Its objections were based partly on the ground that petitioner's purpose for seeking to dismiss without prejudice was to enable him to harass defendant railway by filing another action in a court at a more distant point where it would be inconvenient for the defendant railway to produce witnesses and where the jury would be unable to see the premises and instrumentalities involved. The District Court, after considering the objections of the defendant railway, granted petitioner's motion to dismiss without prejudice by order entered on September 11, 1956.

On November 16, 1956, petitioner filed a complaint against The Chesapeake and Ohio Railway Company in the United States District Court for the Southern District of Ohio, Western Division, at Cincinnati, Ohio, being Civil Action No. 3886 in that Court.

Six months later, on May 21, 1957, the defendant railway filed a motion to transfer the case to the United States District Court for the Eastern District of Kentucky, sitting at Catlettsburg, basing its request upon Section 1404(a) of the Judicial Code.

In support of its motion to transfer, the defendant railway submitted the affidavit of E. M. Hudgins, its general claims attorney (Appendix D). The affidavit related that the plaintiff is a resident of Ironton, Ohio, and was a resident on November 22, 1954, the date the cause of action arose, and that Ironton is approximately 140 railroad miles from Cincinnati, Ohio. The affiant also related that the accident occurred at Ashland, Kentucky, which is approximately 146 railroad miles from Cincinnati. Then the affiant said that all the material and necessary witnesses, approximately ten in number, reside in either Ashland, Kentucky, or Huntington, West Virginia, the latter city situated approximately 160 miles from Cincinnati. Also, affiant related that a number of witnesses were doctors who attended the plaintiff and who could not be compelled by defendant to appear at a trial in Cincinnati.

Petitioner filed an affidavit in opposition to the motion for change of venue (Appendix E). The affiant was Milton H. Schmidt, one of the attorneys for petitioner. He related that petitioner, on advice of his physicians at Ironton, Ohio, came to Cincinnati, Ohio, for examination and treatment for his injuries by Dr. Nicholas Giannestras, orthopedic surgeon, who resides and practices in Cincinnati. On advice of Dr. Giannestras petitioner was required to undergo a serious operation on his spine which was performed at Christ Hospital in Cincinnati, Ohio, where he was confined from March 6, 1957 to March 27, 1957. He

was attended by both Dr. Giannestras and Dr. Lotspeich, who also practices and resides in Cincinnati. As of October 9, 1957, the date of the affidavit, petitioner was still under the care of his Cincinnati physician. Petitioner would be seriously prejudiced if he would be required to produce his medical witnesses at Catlettsburg, Kentucky. It was further stated that all the necessary witnesses for the defendant railway, with the exception of medical witnesses, were employees of the railway and could easily be brought to Cincinnati at the time of trial.

On October 28, 1957, the motion to transfer was argued and submitted to the respondent, Judge Druffel, who granted the motion on January 13, 1958 without an opinion or memorandum.

On January 30, 1958, petitioner filed in the United States Court of Appeals for the Sixth Circuit a petition for a writ of mandamus to the Honorable John H. Druffel, United States District Judge for the Southern District of Ohio, Western Division, respondent herein, to direct nullification of the order of transfer made in the case of *Saunders P. Lemon vs. The Chesapeake and Ohio Railway Company.*

On April 1, 1958, the Court of Appeals denied the petition (Opinion, Appendix A).

REASONS FOR GRANTING THE WRIT.

The Court of Appeals based its decision upholding the venue transfer made by the District Court on the asserted application of the decision in *Norwood vs. Kirkpatrick*, 349 U. S. 29. Actually, the opinion of the Court in the *Norwood* case, in comparing Section 1404(a) with the doctrine of *forum non conveniens*, made this observation (at page 32):

> * * * we believe that Congress by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to grant transfers upon a lesser showing of inconvenience.

But immediately following there were these words of caution:

> This is not to say that the relevant factors have changed or that plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader.

The rulings of the courts below illustrate how far the decision in the *Norwood* case has been extended by misconception and misapplication of the principles therein announced. The concept of broad discretion was used to overlook or minimize a series of relevant factors which required denial of the motion for transfer. This constituted an abuse of discretion to be corrected by mandamus.

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING MOTION TO TRANSFER ON PATENTLY INSUFFICIENT GROUNDS.

It has been a basic rule in the interpretation of Section 1404(a) that unless the balance is *strongly* in favor of the defendant, plaintiff's choice of forum should not be disturbed. (See numerous cases collected in 10 *A. L. R.* 2d 932-944 and Supplements.)

A. Plaintiff's Choice of Forum.

The suit here involved was filed by the petitioner in the district of his residence, which adjoined the transferee district.

The venue privilege granted to the plaintiff by Section 6 of the Federal Employers' Liability Act has been held to be a substantial right. *Boyd vs. Grand Trunk Western Railroad Co.*, 338 U. S. 263, 266. Moreover, the venue section of this Act was not repealed by Section 1404(a) (*Ex Parte Collett*, 337 U. S. 55, 60), and is still to be considered. *Norwood vs. Kirkpatrick, supra.*

In *Koster vs. Lumberman's Mutual Casualty Co.*, 330 U. S. 518, at page 524, it was said that:

> Where there are only two parties to a dispute, there is good reason why it should be tried in plaintiff's home forum if that is his choice. * * * In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum would usually outweigh the inconvenience the defendant may have shown. * * *

Even though the *Koster* case was decided under *forum non conveniens*, the effect of the *Norwood* case is merely one of degree, and not the elimination of factors to be considered.

B. Distances Involved Are Not Great.

All of the decisions of this Court in which orders of transfer have been upheld have involved distances in the hundreds of miles. (*Ex parte Collett, supra,* where the distance involved was some 400 miles; *Kilpatrick vs. Texas and Pacific R. Co.,* 337 U. S. 75, where the accident occurred in Texas, but suit was instituted in New York; *Norwood vs. Kirkpatrick, supra,* where suit was brought about 600 miles from the place of the accident.) Similar substantial distances were involved in cases decided prior to Section 1404(a), under the doctrine of *forum non conveniens.* (*Gulf Oil Corp. vs. Gilbert,* 330 U. S. 501, where the distance involved was more than 400 miles; and *Koster vs. Lumberman's Mutual Casualty Company, supra,* where the plaintiff filed suit about 1,000 miles away from the scene of the accident.)

Here the accident occurred less than 150 miles from Cincinnati, which, in view of modern transportation facilities, is not a substantial or compelling reason for transfer under Section 1404(a).

Sherman vs. Baltimore & Ohio R. Co., W. D. Pa., 1954, 122 F. Supp. 492;

Hohler vs. Pennsylvania R. Co., W. D. Pa., 1956, 140 F. Supp. 487;

Buchanan vs. New York Central R. Co., E. D. Pa., 1957, 148 F. Supp. 732.

C. Failure to Identify Necessary Witnesses or Nature of Their Testimony.

The affidavit in support of the motion to transfer (Appendix D) did not name the witnesses to be called; it did not set forth the nature of the testimony to be offered; nor did it state that the witnesses would be called. It was, therefore, fatally defective.

Jenkins vs. Wilson Freight Forwarding Co., S. D. N. Y., 1952, 104 F. Supp. 422;

Strypek vs. Schreyer, S. D. N. Y., 1954, 118 F. Supp. 918;

McKinney vs. Southern Pacific Co., D. C. Tex., 1957, 147 F. Supp. 954.

D. Testimony of Medical Witnesses Vital to Petitioner's Case.

Examination may be made by physicians in any district for expert testimony, but obviously there is no substitute, except inanimate depositions, for the testimony of the treating physician and operating surgeon. A transfer that would deprive a litigant of a most important witness should be denied. *Schilling-Hillier etc. vs. Virginia-Carolina Chemical Corp.*, S. D. N. Y., 1956, 19 F. R. D. 271.

E. Delay in Filing Motion to Transfer.

There was six months' delay in filing of the motion to transfer. Such untimely filing is by itself ground for denial of the motion.

Brainard vs. Atchison, Topeka & Santa Fe R. Co., N. D. Ill., 1948, 81 F. Supp. 211;

Perry vs. Atchison, T. & S. F. R. Co., N. D. Calif., 1948, 82 F. Supp. 912;

Nagle vs. Pennsylvania R. Co., N. D. Ohio, 89 F. Supp. 822;

Skultety vs. Pennsylvania R. Co., S. D. N. Y., 1950, 91 F. Supp. 118;

Metropolitan Life Insurance Company vs. Potter Bank and Trust Company, W. D. Pa., 1955, 135 F. Supp. 645.

F. Prior Decision of Transferee Court; Estoppel.

When petitioner moved to dismiss his first action in Catlettsburg, Kentucky, the objections of the defendant railway were on the same grounds of inconvenience which it later asserted as the basis for its motion to transfer the second action back to Catlettsburg. By granting petitioner's motion to dismiss, District Judge Swinford must necessarily have found as a controlling evidentiary fact that the defendant railway would not be inconvenienced if the action were to be refiled elsewhere, particularly in the adjoining Southern District of Ohio where petitioner lived. The railway company became bound by the facts determined by the Court, and was estopped from relitigating the same factual issue in another action. *The Evergreens vs. Nunan*, C. C. A. 2, 1944, 141 F. 2d 927.

Each of the foregoing factors individually would warrant, if not require, that the motion to transfer be denied. Compositely, they add up to an abuse of discretion in granting the motion to transfer. This is so, whether the standard of discretion is *forum non conveniens*, or the "lesser showing of inconvenience" that permits a broader discretion to be exercised, as expressed in the *Norwood* case, at page 32 of 349 U. S.

Apparently Mr. Justice Clark foresaw factual situations similar to the instant one when, in his dissenting opinion in the *Norwood* case, he expressed concern that the effect of the *Norwood* case would be to expand the range of discretion "to an as yet unstated degree," and to go "far toward assigning to the trial judge the choice of forums, a prerogative that has previously rested with the plaintiff." (At pages 36-37.)

If there are no guideposts of interpretation to indicate the limits of judicial discretion and to maintain some uniformity of rulings on transfers under Section 1404(a), the choice of forum in some districts may soon be changed to rest with the defendant, instead of the plaintiff. Some district courts may be inclined to grant motions to transfer upon minimal showing of the elements mentioned in Section 1404(a) as one means of unburdening their own heavy dockets. The toleration of an unrestricted discretion in respect to venue permits a frustration and handicapping of a plaintiff's rights without adequate safeguards of review. And particularly, when applied to cases under the Federal Employers' Liability Act, a procedural device is handed to the railroads which they can use to set up a stumbling block in the way of an injured workman seeking a remedy which the law intended to provide for him.

II. THE COURT OF APPEALS SHOULD HAVE EXERCISED ITS POWER TO ISSUE A WRIT OF MANDAMUS PURSUANT TO SECTION 1651(a) OF THE JUDICIAL CODE.

Almost immediately following the enactment of Section 1404(a) of the Judicial Code, and ever since, Courts of Appeals have recognized their authority to issue writs of mandamus in cases involving transfer from one district court to another district court.

Ford Motor Co. vs. Ryan, C. A. 2, 1950, 182 F. 2d 329, cert. den. 340 U. S. 851;

Atlantic Coast Line R. Co. vs. Davis, C. A. 5, 1950, 185 F. 2d 766;

Shapiro v. Bonanza Hotel, Inc., C. A. 9, 1950, 185 F. 2d 777;

Paramount Pictures, Inc. vs. Rodney, C. A. 3, 1950, 186 F. 2d 111, cert. den. 340 U. S. 953;

Nicol vs. Koscinski, C. A. 6, 1951, 188 F. 2d 537;

Wiren vs. Laws, C. A. D. C., 1951, 194 F. 2d 873;

Chicago, R. I. & P. R. Co. vs. Igoe, C. A. 7, 1954, 212 F. 2d 378.

Three such cases have reached this Court by grant of writs of certiorari. In each case it was held that a writ of mandamus was not warranted on the facts, and it was, therefore, unnecessary to pass upon the question of the right to issue a writ of mandamus. (*Ex parte Collett*, 337 U. S. 55; *Kilpatrick vs. Texas and P. Ry. Co.*, 337 U. S. 75; *Norwood vs. Kirkpatrick*, 349 U. S. 29.) However, in *LaBuy vs. Howes Leather Co., Inc.*, 352 U. S. 249, this Court held that mandamus was properly used to require a district judge to vacate an order of reference to a master.

In this case the Court of Appeals recognized its authority to act under the All Writs Act, but declined to exercise its authority because of its interpretation of the *Norwood* decision.

Where a district judge has ordered transfer of a case for grossly inadequate or improper reasons, his abuse of judicial discretion can be corrected only by a writ of mandamus. The effect of failure of a Court of Appeals to act in such case is to deprive a litigant of a forum to which he is entitled. (*Wiren vs. Laws, supra.*) Such a violation of the petitioner's rights cannot be corrected by appeal after judgment, and the petitioner would be left with an empty claim of prejudicial denial of trial in a proper forum.

CONCLUSION.

Motions to transfer are filed and ruled upon daily in many district courts. Unrestricted discretion without review means that standards of interpretation do not exist. The *Norwood* case did not give district courts *carte blanche* to grant indiscriminate transfers of civil actions. The district courts should have an expression from this Court that will circumscribe the limits of discretion in ruling on requests to transfer under Section 1404(a). This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

ELMER I. SCHWARTZ,

Counsel for Petitioner.

Dated: Cleveland, Ohio,
June 25, 1958.

APPENDIX A.

Opinion of the United States Court of Appeals for the Sixth Circuit.

Decided April 1, 1958.

Before SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

MILLER, Circuit Judge. Petitioner filed an action in the United States District Court for the Eastern District of Kentucky at Catlettsburg, Ky., against the Chesapeake and Ohio Railway Co., under the provisions of the Federal Employers' Liability Act to recover damages for serious injuries suffered by him while in the employ of the Railway Company at Ashland, Kentucky. Following the filing of an answer by the Railway Company, petitioner moved to dismiss the action without prejudice. The Railway Company objected, partly on the grounds that the purpose of the dismissal was to enable the petitioner to refile the suit in a court at a more distant point where it would be inconvenient for the Railway Company to produce witnesses and where the jury would be unable to see the premises. The District Judge granted the motion.

Petitioner thereafter filed his action in the United States District Court for the Southern District of Ohio, at Cincinnati, Ohio. The Railway Company moved to transfer the cause to the United States District Court for the Eastern District of Kentucky, at Catlettsburg, basing its motion upon Section 1404(a), Title 28, U. S. Code.[1]

Its affidavit in support of the motion stated that petitioner was a resident of Ironton, Ohio, which is approxi-

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[1] *Section 1404, Title 28, U. S. Code.* "Change of Venue. (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

mately eight miles from Catlettsburg, Ky., and approximately 140 railroad miles from Cincinnati, Ohio, that Catlettsburg is approximately four miles from the scene of the accident in Ashland, Ky., that Ashland is about 146 railroad miles from Cincinnati, and that all the material and necessary witnesses, approximately ten in number, reside either in Ashland or Huntington, West Virginia, approximately 160 miles from Cincinnati. The affidavit stated that a number of the witnesses were doctors who attended the plaintiff and who could not be compelled by the railroad company to appear at a trial in Cincinnati.

Petitioner's affidavit in opposition to the motion stated that he went to Cincinnati for examination and treatment for his injuries by an orthopedic surgeon who performed an operation on his spine at Christ Hospital in Cincinnati, and under whose care he was at the time of the affidavit, that he also was attended by another doctor in Cincinnati, and that he would be seriously prejudiced if required to produce his medical witnesses in Catlettsburg. The affidavit stated that all the necessary witnesses for the Railway Company, with the exception of medical witnesses, were employees of the Railway Company and could readily be brought to Cincinnati at the time of trial. The District Judge sustained the motion and entered an order transferring the action to the District Court at Catlettsburg, Ky.

Petitioner now seeks in this Court a writ of mandamus directing the District Judge for the Southern District of Ohio to nullify his order to transfer to the end that the case be tried before a jury in the District Court for the Southern District of Ohio. Jurisdiction is invoked under Section 1651(a), Title 28, U. S. Code, generally known as the All Writs Act, which provides, "The Supreme Court

and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." It is contended that this is an appropriate case for the Court to exercise its power and issue the writ, in that the matter involved lies outside the issues of the case in which the order was made, that unless the order be reviewed and corrected in this proceeding, it can never be corrected without irreparable prejudice to the petitioner, and that the District Judge in making the order acted beyond his power and in abuse of his discretion.

We find no merit in the contention that the District Judge acted beyond his legal power in making the order of transfer. Section 1404(a) specifically confers upon the District Judge the power to make the transfer when in his opinion the conditions stated in the statute exist. *Ex parte Collett,* 337 U. S. 55; *Barber-Greene Co. v. Blaw-Knox Co.,* 239 F. (2d) 774, 777, C. A. 6th. Since the action "might have been brought" in the Eastern District of Kentucky, we do not have the kind of case in which a writ of mandamus will issue to prevent the District Judge from transferring the case to a district in which as a matter of law it could not have been brought. *Foster-Milburn Co. v. Knight,* 181 F. (2d) 949, C. A. 2nd; *Shapiro v. Bonanza Hotel Co., Inc.,* 185 F. (2d) 777, C. A. 9th. Nor do we have the kind of case in which the District Judge, having jurisdiction and authority to act, fails or refuses to do so, under which circumstances mandamus will lie to require him to act, but without directing him which way to rule. *United States v. U. S. District Court, etc.,* 209 F. (2d) 575, C. A. 6th; *Paramount Pictures, Inc. v. Rodney,* 186 F. (2d) 111, 116, C. A. 3rd, cert. denied, 340 U. S.

953; *Ex parte Park & Tilford*, 245 U. S. 82, 85. The present question goes a step further, in that it involves a situation where the District Judge has acted and made a ruling which he had the legal authority to make, the correctness of which we are asked to review by writ of mandamus.

It is settled that an order granting a transfer or denying a transfer is interlocutory and not appealable. *Norwood v. Kirkpatrick*, 349 U. S. 29, 33; *Littman v. Bache & Co.*, 246 F. (2d) 490, C. A. 2nd; *In re Josephson*, 218 F. (2d) 174, 181, C. A. 1st; *Paramount Pictures, Inc. v. Rodney, supra*, 186 F. (2d) 111, 116, C. A. 3rd, cert. denied, 340 U. S. 953. Whether it can be reviewed by an application for a writ of mandamus is a question which has received much judicial consideration, with a definite conflict in the authorities. The following cases point up the conflict among the authorities and state the reasons in support of the respective views.

Following the general rule that mandamus should not be used as a substitute for an appeal in order to review a nonappealable order, it was held in the following cases that application for writ of mandamus should be denied. *All States Freight, Inc. v. Modarelli*, 196 F. (2d) 1010, C. A. 3rd; *Clayton v. Warlick*, 232 F. (2d) 699, C. A. 4th; *Carr v. Donohoe*, 201 F. (2d) 426, C. A. 8th; *Great Northern Railway Co. v. Hyde*, 238 F. (2d) 852, 241 F. (2d) 707, 245 F. (2d) 537, C. A. 8th, cert. denied, 355 U. S. 872.

The First Circuit, while recognizing the power under Sect. 1651(a), Title 28, U. S. Code, to review an order of transfer in a mandamus proceeding has expressed itself strongly in opposition to the exercise of such power except in really extraordinary situations, the exact nature of which it did not undertake to formulate in advance. *In re Josephson*, 218 F. (2d) 174, 181, 183, C. A. 1st.

In the Fifth Circuit the power to issue the writ is also recognized, but the exercise of the power is restricted to certain types of cases. The Court has said that in the absence of a failure of the District Court to correctly construe and apply the statute, or to consider the relevant factors incident to ruling upon a motion to transfer, or unless it is necessary to correct a clear abuse of discretion, the Court should not entertain motions for writs of mandamus to direct District Courts to enter or vacate orders of transfer. *Ex parte Chas. Pfizer & Co., Inc.*, 225 F. (2d) 720. 723, C. A. 5th; *Ex parte Pharma-Craft Corporation*, 236 F. (2d) 911, C. A. 5th. See: *Atlantic Coast Line R. Co. v. Davis*, 185 F. (2d) 766, C. A. 5th.

In the Second Circuit and in the Court of Appeals for the District of Columbia, the Court was of the opinion with one judge dissenting in the Second Circuit, that the Court had the power to review the order, the correctness of which was tested by the rule of forum non conveniens, as stated in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508. *Ford Motor Co. v. Ryan*, 182 F. (2d) 329, 330, C. A. 2nd; *Wiren v. Laws*, 194 F. (2d) 873, 874, C. A. D. C. See also: *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F. (2d) 866, C. A. 2nd. However, with respect to the applicability of the rule of forum non conveniens, the *Ford Motor Co.* case and the *Wiren* case were decided prior to the ruling in *Norwood v. Kirkpatrick, supra*, 349 U. S. 29, wherein it was held that a transfer under Section 1404(a) involved a broader discretion than previously existed under the rule of forum non conveniens.

In the Seventh Circuit the Court ruled that the order of the District Court denying a motion to transfer was reviewable for abuse of discretion through an application for a writ of mandamus, and reversed the ruling of the

District Judge with one judge dissenting. *Chicago, R. & I. & P. Co. v. Igoe,* 212 F. (2d) 378, 381, 220 F. (2d) 299, C. A. 7th.

The Supreme Court has recognized the existence of the issue, but found it unnecessary to specifically rule upon it. *Norwood v. Kirkpatrick, supra,* 349 U. S. 29, 33; *Ex parte Collett, supra,* 337 U. S. 55, 72. However, two other cases have some bearing upon the question. In *Bankers Life & Casualty Co. v. Holland,* 346 U. S. 379, the Court held under the circumstances there existing mandamus against a federal district judge was not an appropriate remedy to vacate a severance and transfer order under Sect. 1406(a). In *La Buy v. Howes Leather Co., Inc.,* 352 U. S. 249, the Court held under the exceptional circumstances there existing mandamus was properly used to require the district judge to vacate an order of reference to a master.

The question is not a new one in our own circuit. In *Nicol v. Koscinski,* 188 F. (2d) 537, C. A. 6th, we reviewed an order of transfer upon a petition for writ of mandamus, with a separate opinion by each of the three members of the Court. Two of the judges ruled by implication, without reference to or discussion of the issue, that the Court had the power to review the order upon a petition for writ of mandamus, one judge ruling that the order of transfer was not clearly erroneous, and the other judge ruling that the finding upon which it was based was clearly erroneous. The third judge concurred in the result that the petition should be denied, but on the ground that the petition for the writ could not be used as a substitute for an appeal in an attempt to review a non-appealable, interlocutory order. He also pointed out that mandamus will lie to compel a judge to act, but not to act in any particular way.

In *Sun Oil Co. v. Lederle*, 199 F. (2d) 423, C. A. 6th, we also reviewed upon petition for writ of mandamus the action of the District Judge overruling a motion to transfer, in a short per curiam opinion, which likewise held by implication, again without a reference to or discussion of the issue and without citing *Nicol v. Koscinski, supra,* that the Court had the power to review the order by such a proceeding. We affirmed the order of the District Judge on the ground that there was no abuse of discretion shown, citing *Gulf Oil Corporation v. Gilbert, supra,* 330 U. S. 501. As pointed out hereinabove, the Supreme Court has since held that the rule of forum non conveniens announced in the *Gulf Oil Corporation* case is not the applicable rule at the present time. See also: *Cutting Room Appliances Corp. v. Jones,* 218 F. (2d) 954, C. A. 6th; *Fannin v. Jones,* 229 F. (2d) 368, C. A. 6th, cert. denied, 351 U. S. 938; *Berkihiser v. Jones,* 229 F. (2d) 959, C. A. 6th, cert. denied, 351 U. S. 938.

Although the foregoing authorities show some difference of views among the circuits and some doubt concerning the right of the Court of Appeals to review by mandamus proceedings an order of transfer under Section 1404(a), we are of the opinion that considering solely the power of the Court to so act, the question is correctly settled in this circuit that the Court has such power. *Nicol v. Koscinski, supra; Sun Oil Co. v. Lederle, supra; Fannin v. Jones, supra; LaBuy v. Howes Leather Co., supra,* 352 U. S. 249; *U. S. Alkali Export Association v. United States,* 325 U. S. 196, 204; *Black v. Boyd,* 248 F. (2d) 156, 159-160, C. A. 6th.

Whether the power should be exercised and the writ issued in the present case, is a different question. In *Nicol v. Koscinski, supra,* the two members of the Court ruling

on the validity of the order of transfer differed in their conclusions. In *Sun Oil Co. v. Lederle, supra,* we approved the order denying the transfer by applying the rule of forum non conveniens, which standard the Supreme Court subsequently disapproved. Under the decision in *Norwood v. Kirkpatrick, supra,* there is now a broader discretion on the part of the District Judge. In the other cases from this Court, above referred to, we referred to the broad discretion which the District Judge was called upon to exercise in considering a motion to transfer, citing in the *Fannin* case the recent ruling of the Supreme Court in *Norwood v. Kirkpatrick, supra.* In each of those cases we upheld the ruling of the District Judge. The power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is a clear abuse of discretion or usurpation of judicial power. *Bankers Life & Casualty Co. v. Holland, supra,* 346 U. S. 379, 383; *Ex parte Fahey,* 332 U. S. 258, 259-260; *In re Josephson, supra,* 218 F. (2d) 174, C. A. 1st; *Ex parte Chas. Pfizer & Co., Inc., supra,* 225 F. (2d) 720, C. A. 5th.

In this case, as in most cases of this kind, there are factors favorable to both the District Court in Kentucky and the District Court in Ohio, requiring a balancing of conveniences by the District Judge. *Barber-Greene Co. v. Blaw-Knox Co., supra,* 239 F. (2d) 774, 778, C. A. 6th. Each of the parties is faced with the difficulty of having its medical witnesses present at the trial if the trial is held in a different place than where they respectively ask it to be held. Catlettsburg, Ky., is very close to both the scene of the accident and where the petitioner lives, and also much more convenient for the witnesses, other than the medical witnesses. The choice of the forum by the petitioner is no

longer as dominant a factor as it was prior to the ruling in *Norwood v. Kirkpatrick, supra.* The prior filing of the action in the Eastern District of Kentucky indicates that except for the question of medical witnesses, that forum would be the one preferred by the petitioner. We do not find present in this case the exceptional circumstances where there is a clear abuse of discretion such as to justify the use of the writ. *Bankers Life & Casualty Co. v. Holland, supra,* 346 U. S. 379, 383-384. *Massey-Harris-Ferguson, Ltd. v. Boyd,* 242 F. (2d) 800, C. A. 6th, cert. denied, 355 U. S. 806.

In our opinion, the rule of collateral estoppel does not prevent the Railway Company from seeking and obtaining the order of transfer. On the record before us, the previous order of the District Court for the Eastern District of Kentucky in sustaining petitioner's motion to dismiss without prejudice was not a ruling on a motion to transfer and did not necessarily involve the identical issues. *Kelliher v. Stone & Webster, Inc.,* 75 F. (2d) 331, C. A. 5th; *Russell v. Place,* 4 Otto (94 U. S.) 606; *DeSollar v. Hanscome,* 158 U. S. 216, 221.

The petition for the writ of mandamus is denied.

APPENDIX B.

Order of the United States Court of Appeals For the Sixth Circuit.

(Filed: April 1, 1958.)

BEFORE: SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

Petitioner's application for a Writ of Mandamus, having been considered by the Court:

IT IS ORDERED that said application be denied.

Approved for entry:

BY SHACKELFORD MILLER, JR. /s/
U. S. Circuit Judge.

APPENDIX C.

Order of the United States District Court for the Southern District of Ohio, Western Division, Granting Motion to Transfer to the United States District Court for the Eastern District of Kentucky.

No. 3886.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

SAUNDERS P. LEMON,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,
Defendant.

ORDER TRANSFERRING ACTION.

This matter having been heard on a motion by defendant under 28 U. S. C. A., Section 1404(a) for an order transferring the above entitled action to the United States District Court for the Eastern District of Kentucky sitting at Catlettsburg, Kentucky, and Counsel for the parties having been heard thereon, and the Court being fully advised in the premises, finds said motion to be well taken.

WHEREFORE, it is hereby ordered that the above entitled action be and the same is hereby transferred to the United States District Court for the Eastern District of Kentucky sitting at Catlettsburg, Kentucky.

It is further ordered that the Clerk of the United States District Court for the Southern District of Ohio, Western Division, forward a transcript of the pleadings and proceedings heretofore had in said Court to the Clerk of the United States District Court for the Eastern District of Kentucky sitting at Catlettsburg, Kentucky.

It is further ordered that defendant be, and it is hereby granted, twenty days from receipt of said transcript by the said Clerk of the United States District Court of the Eastern District of Kentucky sitting at Catlettsburg, Kentucky in which to plead, to all of which plaintiff excepts.

/s/ JOHN H. DRUFFEL,
Judge.

APPENDIX D.

Affidavit in Support of Motion to Transfer Filed in the United States District Court for the Southern District of Ohio, Western Division.

(Civil Action No. 3886—caption omitted.)

STATE OF VIRGINIA,
CITY OF RICHMOND, SS.

E. M. HUDGINS, being first duly sworn, on oath deposes and says:

1. He is General Claims Attorney of the defendant in the above-entitled case.

2. He is familiar with the facts of this case, and is the duly authorized agent of the defendant for the purpose of preparing this affidavit.

3. Plaintiff is a resident of Ironton, Ohio, and was a resident thereof on November 22, 1954, the date of the accident out of which the present cause of action arose. Cincinnati is approximately 140 railroad miles from the place of plaintiff's residence.

4. The accident occurred at Ashland, in Boyd County, Kentucky. Cincinnati is approximately 146 railroad miles from the scene of the accident.

5. All the material and necessary witnesses, approximately ten in number, reside in Ashland, Kentucky, and Huntington, West Virginia. Cincinnati is approximately 146 railroad miles from Ashland, Kentucky, and approximately 160 railroad miles from Huntington, West Virginia. A number of these witnesses are doctors who attended plaintiff and who cannot be compelled by defendant to appear at a trial held at Cincinnati, and defendant might well be deprived of the personal appearance of said witnesses.

6. There is a United States District Court for the Eastern District of Kentucky, with regularly scheduled terms, sitting at Catlettsburg, Kentucky. Catlettsburg is approximately eight miles from the plaintiff's residence and approximately four miles from the scene of the accident. All of the necessary witnesses reside either in Ashland, Kentucky, which is approximately four miles from Catlettsburg, Kentucky, or in Huntington, West Virginia, which is approximately twelve miles from Catlettsburg. All of the material and necessary witnesses, including the doctors by whom plaintiff has been attended and examined, could conveniently, with a minimum of absence from their work and their homes, and at considerably less expense and inconvenience to the defendant, attend a trial held at Catlettsburg. The United States District Court at Catlettsburg is available to the plaintiff, and this action should be transferred to that court. Affiant is advised that the docket of the United States District Court at Catlettsburg is current, and plaintiff's case could be heard promptly.

7. On February 17, 1956, this defendant was served with summons in a suit filed by this same plaintiff in the United States District Court at Catlettsburg (Civil Action No. 390), based on the same cause of action as set forth in the instant suit filed in the United States District Court at Cincinnati (Civil Action No. 3886). Civil Action No. 390 was set for trial at Catlettsburg on September 14, 1956. After defendant made full preparation for trial, including the expense of having special medical examinations made of plaintiff by Ashland doctors, plaintiff, on September 11, 1956, moved to dismiss Civil Action No. 390 at Catlettsburg without prejudice and to withdraw the name of his counsel. Defendant objected vigorously to the dismissal of the action on several grounds, including

(1) the fact that plaintiff had permitted his case to remain on the docket for several months and has caused defendant to prepare for trial before indicating a desire to dismiss without prejudice; (2) that plaintiff's purpose for seeking to dismiss without prejudice was to enable him to harass the defendant by filing another action in a court at a more distant point where it would be inconvenient for the defendant to produce witnesses and where the jury would be unable to see the premises and instrumentalities involved; and (3) that defendant had plaintiff examined by Ashland doctors for the purpose of qualifying them to testify in Catlettsburg before the plaintiff asked dismissal of the action which was filed there.

/s/ E. M. HUDGINS.

(Jurat omitted.)

APPENDIX E.

Affidavit in Opposition to Motion for Change of Venue filed in the United States District Court for Southern District of Ohio, Western Division.

(Civil Action No. 3886—caption omitted.)

STATE OF OHIO,
HAMILTON COUNTY, SS:

MILTON H. SCHMIDT, being first duly sworn, states:

1. He is one of the attorneys for plaintiff in this action. The action is brought under the Federal Employers' Liability Act to recover damages for serious injuries suffered by plaintiff on November 22, 1954, while performing his duties as a check clerk for defendant railroad at its freight office at Ashland, Kentucky.

2. Plaintiff's complaint in this action was filed in this Court on November 16, 1956. The defendant did not file any pleading or motion herein until May 21, 1957, when the pending motion for change of venue was filed.

3. Plaintiff resides at Ironton, Ohio, which is within the Southern District of Ohio in which this Court has jurisdiction.

4. On advice of his physicians at Ironton, Ohio, the plaintiff came to Cincinnati, Ohio, for examination and treatment for his injuries by Dr. Nicholas Giannestras, orthopedic surgeon, who resides and practices in Cincinnati. Plaintiff was required to undergo a serious operation on his spine which was performed at Christ Hospital in Cincinnati, Ohio, where he was confined from March 6, 1957, to March 27, 1957. He was attended by both Dr. Giannestras and Dr. Lotspeich, who also practices and resides in Cincinnati. Plaintiff is still under the care of his Cincinnati physician.

5. Plantiff previously filed a complaint involving the same cause of action as set forth in the instant case in the United States District at Catlettsburg, Kentucky. Subsequently plaintiff moved to dismiss the action filed at Catlettsburg without prejudice. The motion for dismissal was, as stated in the affidavit filed on behalf of defendant herein, strenuously opposed by defendant. Defendant's objections were based in part on the ground that dismissal would enable plaintiff to file the same action in another Federal District Court more distant from the place of the accident and thus inconvenience defendant in producing its witnesses.

The Court (Swinford, J.) after considering defendant's objections, granted the motion to dismiss without prejudice by order entered September 11, 1956.

6. On information and belief, affiant states that all the necessary witnesses for defendant, with exception of medical witness, are employees of defendant railroad and could readily be brought to Cincinnati at the time of the trial.

7. Plaintiff will be seriously prejudiced in producing his witness as to his medical, surgical treatment and hospitalization in Cincinnati if this motion is granted.

MILTON H. SCHMIDT,
Attorney for plantiff.

(Jurat omitted.)